88-1176

Supreme Court, U.S.
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No. 88-___

In The

Supreme Court of the United States

October Term, 1988

VANE NEWTON, *et al.*,

Cross-Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRUCE H. STOLTZE
(Counsel of Record)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312
(515) 274-1450
Counsel for Respondents

KRISTIAN ANDERSON
(On the Brief)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in borrowing a six month statute of limitations established in § 10(b) of the National Labor Relations Act rather than the two year statute of limitations established in § 3 First (r) of the Railway Labor Act?

2. Did the Court of Appeals err in upholding the entry of summary judgment regarding the statute of limitation issues when factual issues were raised regarding the accrual date of the cause of action and the existence of facts would support the equitable tolling of the statute of limitations?

3. Does the existence of a fiduciary relationship between an employee and his union alter the analysis relating to the "discovery" of a cause of action that a court should use in deciding whether to equitably toll a statute of limitations?

LIST OF PARTIES

The following individuals are named as cross-petitioners in this matter:

Francis E. Amiot
Dennis D. Anderson
Mike Arispe
Robert B. Bailey
John E. Beghtol
Angeline V. Boll
Anthony C. Brackey
Kenneth W. Brevig
Larry D. Briegel
Douglas L. Brower
Jack E. Brown
Kenneth W. Brown
John E. Brunskill
Donald D. Buhmann
J. W. Burke, Jr.
Milton E. Capps
Jack L. Chambers
Dennis E. Chaplin
Todd F. Chumbley
B. J. Clark
Richard A. Clark
N. M. Cole
Richard E. Davidson
Richard F. Davis
David G. Dickey
Leland T. Dingman
Larry K. Dixon
William D. Dixon
Robert R. Doyle
Edward L. DuBois
Robert L. Duncan
Glen Dale Eads
Max A. Eads
Stephen R. Early
Paul E. Ellis
George R. Etherton
Randy E. Etherton
Joseph R. Fitzgerald
Don R. Foland
Tom A. Fox
Kenneth L. Frazier
Daniel J. Fuqua
James M. Gass
Tennis G. Gordon
Patrick M. Greene
Richard L. Guile
Alten R. Hammett
Ted E. Hanke
Orville E. Harger
John R. Harrison
Robert Eugene Harrison
Daniel H. Hein
Phillip H. Hein
William H. Hein
Earl F. Hill
Craig Harms Hornby
Debra Sue Hornby
David M. Johnson
Harold E. Johnson
Lloyd E. Johnson
Robert L. Judge
Dale Martin Keith
John F. Keith
Donald L. Kidd, Sr.
H. L. Kidd, Jr.
Kenneth F. Kimberling
Harold L. King
James L. Knox
Kerry S. Knutsen
Charles E. Long
Larry D. Love
Robert W. Luth

LIST OF PARTIES–Continued

James R. Maloney
James P. Manuel, Jr.
David R. McBroom
Donald P. McCaleb
Ralph L. McCoy
Jerry F. McCracken
Robert N. McCracken
Marvin Meeker
Daneil V. Middour
Charles H. Miller
Lowell D. Malloy
Roger L. Moore
Wayne A. Moore
Robert J. Murphy
John A. Myers
John D. Myers
John F. Myers
Richard A. Neuman II
Darrell Newman
Steven Arthur Newton
Vane Newton
Richard A. Nitcher
Oscar D. Overton
Jerry E. Payne
Robert J. Peoples
Richard N. Petersen
Harlan W. Peterson
Mark R. Pomeroy
Curtis E. Provance
James F. Ramsey
John E. Reece
T. J. Reed
Gary Grant Rogers
William E. Rosenstangle
Stephen D. Rosenstangle
Roger L. Rothamel
B. J. Rude
Joseph A. Rush
Dennis L. Schrader
L. Lee Beardsly
Daryl L. Schweiger
Karl W. Seeburger
Leo T. Seehan
Jack L. Shelton
Allan P. Sherling
James L. Smith
E. D. Snyder
Wilbur Stanton
Ronald J. Stearns
Hugh V. Steele
Charles T. Stickler
James L. Still
J. R. Stone
Dennis L. Stowe
John L. Strait
Paul W. Strawn
James W. Sundall
Roger L. Swift
Eugene R. Thelen
Clyde R. Thomas
Allan J. Thompson
Richard D. Thorsland
Robert J. Tollakson
G. N. Troxel
Terry B. Turvold
Howard A. Tuttle
James A. Tuttle
W. R. Urton
Ronald R. Werth
Marquis R. West
Larry E. Whitt
Billy Ray Wiggins
Donnie R. Wilford
Billy G. Williams
Larry L. Williams
Max R. Williams
Robert Lee Wilson
David G. Yackle
Gary E. Yezek
Eldon Zitterlich

LIST OF PARTIES–Continued

The following entities are named as cross-respondents in this matter: Brotherhood of Locomotive Engineers; Chicago and North Western Transportation Company; United Transportation Union, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees; and the Railroad Yardmasters of America.

The following individuals took part in the lower court proceedings, but do not appear as cross-petitioners:

Lloyd G. Andrews
Donald E. Bisgaard
La Don E. Crane
Sam H. Dean
A. M. McQuade
Frank M. Ramey
Arnold M. Scheel
Robert W. Shaner
John R. Vincent

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v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Petitioners, former employees of the Chicago, Rock Island & Pacific Railroad Company ("Rock Island"), respectfully request that if a writ of certiorari issues to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, that the Court also issue a writ of certiorari based upon the issues raised in this cross-petition.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 850 F.2d 1255 (Pet. App. 1a-46a).[1] That opinion was issued upon a request for rehearing and superseded the court's earlier opinion which was reported at 836 F.2d 1493 (Pet. App. 47a-91a). The opinions, rulings, orders, and judgment of the United States District Court for the Southern District of Iowa which form the basis for the Court of Appeals' opinion are all unreported (Pet. App. 93a-127a).

JURISDICTION

The decision of the court of appeals upon rehearing was issued on June 15, 1988. Cross-Respondents filed petitions for rehearing and suggestion for hearing en banc. Those petitions were denied on September 14, 1988. Cross-Respondent Brotherhood of Locomotive Engineers filed its petition for a writ of certiorari on December 13, 1988. The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

Cross-Petitioners are filing this cross-petition pursuant to Supreme Court Rule 19.5. As required by Rule 21.1(e)(iii), cross-petitioners state that they received the petition filed in No. 88-968 on December 13, 1988. Since this cross-petition is being filed pursuant to Rule 19.5,

[1] All of the relevant opinions, rulings, orders, and judgments of the lower courts are contained in the appendix to the Petition filed in *Brotherhood of Locomotive Engineers v. Vane Newton, et al.*, No. 88-968. Citations to that appendix shall be designated "Pet. App.".

Supreme Court Rule 20.5 states that this cross-petition cannot be granted unless the Court grants the petition for writ of certiorari filed in No. 88-968.

STATUTES INVOLVED

Sections 105 and 122 of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. § § 1004, 1017, and 45 U.S.C. § § 797b, 797c, and 797m are set forth at Pet. App. 128a-133a; Section 3 First (r) of the Railway Labor Act, 45 U.S.C. § 153 First (r), and Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) are set forth at Cross-Petition Appendix 1a.

STATEMENT OF THE CASE

Much of the background and underlying facts of this case are set forth in the Petition for Writ of Certiorari and Respondents' Brief in Opposition filed in *Brotherhood of Locomotive Engineers v. Newton*, No. 88-968. The additional facts which the Court will need to decide this cross-petition are set forth below.

1. The Eighth Circuit held that damage claims against the cross-respondents were barred because they were brought more than six months following the accrual of the causes of action (Pet. App. 24a-25a). The court relied upon reasoning similar to that contained in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Cross-Petitioners had argued that the two year statute contained in Section 3 First (r) of the Railroad

Labor Act, 45 U.S.C. § 153 First (r), should be used in this case. In making that argument, cross-petitioners noted that Congress had struck a different balance in railroad labor cases than in other cases regarding the time limit for challenging an action involving labor relations which justified the use of a two year limitation period rather than a six month period.

2. Cross-Petitioners also argued that the limitation period should have begun to run within a reasonable time after June 20, 1983, rather than at the earlier date used by the district court. They argued that the factual record made it inappropriate to resolve the matter against them at the summary judgment stage of the district court proceedings, because evidence supporting their claim had been submitted into the record. Cross-Petitioners also argued that, in any event, the statute of limitations should have been tolled because the cross-respondents had fraudulently concealed certain facts from them. The Eighth Circuit rejected both of those arguments without comment.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve an important issue regarding the statute of limitations for actions brought under the Railway Labor Act, since the court below and the other courts of appeals have improperly established a six month limitation period.

The Eighth Circuit determined that it should follow the reasoning of *DelCostello* and determine that a six month statute of limitation period should apply for

unfair representation claims brought under the Railway Labor Act. A similar conclusion has been reached by a number of other circuit courts.[2] Courts have rejected the argument that the two year period specified in Section 3 First (r) of the Railway Labor Act, 45 U.S.C. § 153 First (r), does not apply to cases such as this one. The various court's conclusions are purportedly based on the *DelCostello* analysis that there is a congressional attempt to have "relatively rapid final resolution of labor disputes" in all fields regulated by federal labor law. *DelCostello*, 462 U.S. at 168.

In analyzing whether the courts of appeals' analyses are correct, "[i]t should be emphasized from the outset, . . . that the National Labor Relations Act cannot be imported wholesale into the railway labor area. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) (footnote omitted).

Section 3 First (r) relates to the time that an aggrieved party has to challenge the arbitration decision in a dispute governed by Section 3 First. Congress established a two year period for such an appeal. Thus, Congress balanced the needs for finality of a labor dispute and quick resolution of a labor dispute differently in the context of the Railway Labor Act than it has in other labor statutes. *Compare* 45 U.S.C. § 153 First (r) (two years) *with* 29 U.S.C. § 160(b) (six months).

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[2] The cases which have reached similar conclusions are listed in the petition in No. 88-968 at pages 17-18.

Although courts which have analyzed this question have stated that the two year period specified in the Railroad Labor Act evidences different concerns than the six month period specified in the National Labor Relations Act, those courts have not paid sufficient deference to the intent of Congress.[3] In enacting the Railroad Labor Act, Congress meant to deal with certain specific concerns raised by the nature of labor-management disputes between railroads and railroad unions. At the time of its passage, many of the disputes that had arisen were quite contentious. *See, e.g., Slocum v. Delaware, Lackawanna & Western Railroad Co.*, 339 U.S. 239, 242 (1950) (the "plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes"). Congress, however, determined that a two year period was more appropriate than a shorter or a longer period to allow an arbitration decision to be challenged.

The ability of a party to challenge an arbitration two years after it was decided, and certainly much longer than two years after the underlying dispute arose, in a potentially contentious atmosphere, indicates that Congress believed that a two year period was not too long. Indeed, because of many of the tensions that existed (and still exist) in railroad labor matters, a longer period can

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[3] The issue of whether a six month statute of limitations should apply to Railway Labor Act cases has not been decided by this Court. Although *West v. Conrail*, 481 U.S. ___, 95 L.Ed.2d 32 (1987) dealt with certain statute of limitations issues under the Railway Labor Act, it did not decide whether the six month *DelCostello* period should be applied to railroad cases.

be seen to help the parties to cool off and try to resolve their differences through discussion, rather than forcing parties to bring disputes to court within a six month period. Thus, the two year time limit specified in Section 3 First (r) was a rational and thoughtful decision by Congress not to rush railway cases into court.

The lower courts have failed to follow that congressional intent. Instead, they are forcing disputes to be resolved during a shorter time period than that specified in the Railway Labor Act. Because the lower courts have improperly grafted a six month limitation onto the Railway Labor Act, this Court should grant the cross-petition to resolve this matter, and insure that the statute is interpreted according to the intent of Congress.

In addition, this Court has a similar case pending before it. In *Reed v. United Transportation Union*, No. 87-1031, *cert. granted*, 99 L.Ed.2d 267 (1988) (case argued Nov. 2, 1988), this Court has been asked to decide whether the six month limitation period of *DelCostello* should apply to cases arising under § 101 of the Labor Management Reporting and Disclosure Act rather than a three year state limitation period. If the Court decides to hear the statute of limitation issue raised in this cross-petition, its decision in *Reed* and in this case can resolve a number of issues relating to the applicability of the six month limitation period of § 10(b) of the Labor Management Relations Act to all federal labor statutes.

II. The Eighth Circuit erred in its application of summary judgment principles to the jurisdictional issues raised in this case.

This case was decided on summary judgment motions in the district court. In opposition to those motions, cross-petitioners submitted evidence indicating that there was a factual dispute regarding which date should be used to start the running of the statute of limitations. Cross-Respondents contended that the causes of action accrued more than six months prior to the initiation of litigation. Cross-Petitioners, on the other hand, state that a reasonable time after June 20, 1983, was the correct date, since that was the day on which the sale of the assets of Rock Island to the Chicago & North Western Transportation Company ("CNW") was approved by the bankruptcy court. Prior to that time, there was great uncertainty regarding which carrier would obtain the assets and run the lines at issue.[4]

In addition, cross-petitioners argued that the statute of limitations should be tolled because the unions affirmatively mislead them regarding the union activities. *Cf. Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (equitable

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[4] Indeed, the bankruptcy court's decision regarding the final distribution of assets was delayed for some time because of this Court's decision in *Railway Labor Executives' Assoc. v. Gibbons*, 455 U.S. 457 (1982). The *Gibbons* decision affected this matter since it declared that certain employee protection clauses in the RITEA were unconstitutional. Thus, that decision cast doubt upon the status of all agreements based on the initial version of the RITEA.

tolling doctrine "is read into every statute of limitations"). Cross-Petitioners argued that these misrepresentations were sufficient to toll the running the statute of limitations. In support of that proposition, they submitted affidavits describing the statements that were made by the unions.

In particular, cross-petitioners alleged that the statute could be tolled because they had exercised "due diligence" in discovering the existence of their claim against the cross-respondents despite the fraudulent concealment of that claim.[5] Their affidavits indicate that the cross-respondent unions misrepresented the need to challenge the seniority provisions and hiring conditions until after the purchase of the Rock Island assets was made final. Cross-Petitioners also argued that since that cross-respondent stood in a fiduciary relationship to them, the cross-respondents' actions constituted a fraudulent misrepresentation that they could reasonably rely upon. In connection with that argument, cross-petitioners noted that state law supported the relaxation of the evidence needed to show fraudulent misrepresentation when a fiduciary relationship exists between the parties. *See, e.g., Pride v. Peterson*, 173 N.W.2d 549, 555 (Iowa 1970). The Court of Appeals dismissed this argument without comment.

The movant has the burden to demonstrate in its summary judgment motion that there is no genuine issue

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[5] The district court had held that equitable tolling of the statute of limitations was unavailable to cross-petitioners because they failed to demonstrate that they acted with "due diligence" and failed to show that there was fraudulent concealment of the claim (Pet. App. 112a).

of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In addition, all inferences for materials before a court deciding a summary judgment motion are to be interpreted in the light most favorable to the non-moving party. *Matsushita Electric Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The courts below disregarded those principles by not allowing this matter to go forward for a full hearing regarding the facts connected with the tolling of the statute of limitations, the date upon which the running of the statute of limitations should begin, and the availability of equitable tolling when a fiduciary relationship exists.

The actions of the lower courts raise several important issues which this Court should resolve. First, the decisions raise an issue regarding how a lower court should resolve jurisdictional issues in a summary judgment context. The lower courts simply appear to have presumed that the earlier dates were the proper dates for the start of the running of the statute of limitations, even though cross-petitioners attempted to raise factual issues regarding whether the seniority and hiring conditions were, in fact, "final" or whether they were interim conditions which became final on June 20, 1983.

Second, because this case took place in the context of a bankruptcy proceeding, it would be important for the court to resolve when a statute of limitations begins to run when there is uncertainty regarding the sale of assets during a bankruptcy proceeding. Thus, whenever there is a temporary transfer of assets which results in an agreement between the temporary owner and a labor union, the court should decide when that agreement becomes

final for purposes of filing an action under the applicable labor statute. The lower courts appear to decide that the statute of limitations *always* runs from the signing of an agreement, even when a transfer of ownership is not complete, and indeed may be uncertain. If that is the correct law, then the courts below are correct. If, however, the statute of limitations could begin on some other date, the lower courts incorrectly granted the summary judgment motion.

In addition, this case raises issues regarding the equitable tolling of a limitation period in a labor context. While the Courts recognize the union is a fiduciary to the union members, the courts have, without comment, failed to apply the fiduciary concept within the context of the application of a rather short and strict statute of limitations. That issue is an important one which should be resolved by this Court.

CONCLUSION

For the reasons stated above, cross-petitioners request that if this Court grants the petition in No. 88-968 by issuing a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, that it also grant this cross-petition and issue a further writ of certiorari.

Respectfully submitted,

BRUCE H. STOLTZE
(Counsel of Record)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312
(515) 274-1450
Counsel for Respondents

KRISTIAN ANDERSON
(On the Brief)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312

APPENDIX

ADDITIONAL STATUTE INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b):

(b) **Complaint and notice of hearing – Answer – Court rules of evidence inapplicable.** Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be serve upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board, or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said

proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

Section 3 First (r) of the Railway Labor Act, 45 U.S.C. § 153 First (r), states:

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

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Nos. 88-1176 and 88-1184

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VANE NEWTON and L. LEE BEARDSLY, ET AL.,

Cross-Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,

Cross-Respondents.

CROSS-RESPONDENT UNITED TRANSPORTATION UNION'S MEMORANDUM IN OPPOSITION TO CROSS-PETITIONS

CLINTON J. MILLER, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107-4250
(216) 228-9400

Counsel for Cross-Respondent United Transportation Union

(C) 302

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Nos. 88-1176 and 88-1184

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,

Cross-Respondents.

CROSS-RESPONDENT UNITED TRANSPORTATION UNION'S MEMORANDUM IN OPPOSITION TO CROSS-PETITIONS

United Transportation Union ("UTU"), cross-respondent herein, respectfully submits that it is apparent the cross-petitions filed by the employees of the former Chicago, Rock Island & Pacific Railroad Company ("Rock Island") in Nos. 88-1176 and 88-1184 further support a grant of the cross-petition for writ of certiorari filed by UTU in No. 88-1169, along with the petitions filed by the Brotherhood of Locomotive Engineers ("BLE") in 88-968 and Chicago & North Western Transportation Company ("CNW") in No. 88-994. But UTU submits that the cross-petitions in Nos. 88-1176 and 88-1184 should be denied.

The petitions filed by BLE and CNW, and cross-petition filed by UTU, present a question of exceptional importance, *viz.*, whether a court of appeals may provide an arbitration remedy for employee-members seeking to set aside a seniority implementing agreement, when that court has held that the action to set aside that agreement was time-barred under the six-month limitations period set forth in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and those employees' substantive claims did not lie in federal court.

The UTU cross-petition in 88-1169 also raises inextricably related questions of whether the arbitration award at issue may be vacated in the absence of bad faith and carrier collusion, and whether a court may substitute its judgment for that of the union in construing a union constitution in the absence of a finding of bad faith.

CNW filed the petition in No. 88-994, which raises questions as to whether the suits were timely filed in seeking an order to compel interest arbitration, *i.e.*, arbitration as to the substantive provisions of seniority issues already negotiated between the authorized bargaining representatives, and whether the timeliness of the arbitration ordered by the court of appeals is to be determined by the doctrine of laches, as the court below decided, or the six-month *DelCostello* limitations rule.

These cross-petitions, on the other hand, raise additional fact-specific issues not worthy of consideration by this Court which are not needed to resolve the effect of the court of appeals' order upon the seniority implementing agreements. More specifically, all of the petitions address the principal issue of the effect of that order

upon the rights the parties would otherwise have in connection with resolving the disputes associated with the employment rights and seniority arising out of the acquisition of the lines of the former Rock Island by CNW. These cross-petitions raise issues which complicate the analysis and resolution of the effect of the direction to compulsory arbitration of the adequacy of the former Rock Island employees' seniority rights upon the rights of rail labor and management to negotiate upon that subject under the March 4th Agreement and laws governing railroad labor relations.

Cross-petitioners suggest that a two-year limitations period, adopted from Section 3, First(r) of the Railway Labor Act, 45 U.S.C. 153, First(r) should be applied to all claims arising in the railroad industry, including hybrid claims, even though the doctrine of the duty of fair representation was first enunciated under the Railway Labor Act ("RLA"), and the six-month *DelCostello* period has been uniformly applied in RLA breach of duty of fair representation cases.

Cross-petitioners also make an amorphous, fact-specific claim that the courts below failed to properly review the record as to the facts supporting their view of the appropriate accrual date for their claims and their definition of equitable tolling doctrines, although they clearly rely on their mere allegations in the complaints.

STATEMENT OF CASE

Detailed statements of the facts are set forth in the petitions in Nos. 88-968 and 88-994 and the cross-petition

in 88-1169. Cross-petitioners' statement does not discuss the findings and conclusions made by the trial court as to the date of accrual of their claims and the inapplicability of the discovery and fraudulent concealment tolling doctrines.

Cross-petitioners' evidence in the district court went to the fair representation issue as to the ground service employees, who were among those represented by UTU, and were the subject of the award of Arbitration Board No. 456 handed down on May 20, 1983. The original complaints in *Newton, et al. v. Chicago & N.W. Transp. Co., et al.*, No. 83-641-D (S.D. Iowa), and in *Reece, et al. v. CNW, et al.*, No. 83-640-B (S.D. Iowa), were filed on November 18, 1983, two days prior to expiration of the six-month period from issuance of this award, thereby indicating familiarity with the six-month period from *DelCostello*. *See*, Cross-Petitioner's Appendix in No. 88-1169 (hereafter "Pet. App.") at 24a.

In its April 16, 1986 decision, the district court held that the claims of the engine service employees represented by BLE and UTU in *Newton* accrued on February 16, 1982, the date the implementing agreements were signed, "because (a) the injury about which plaintiffs complain became 'fixed and reasonably certain' at the time the implementing agreements were signed, and (b) the unions took no action of any consequence after that time. *See, Hafer v. Air Line Pilots Association*, 525 F.Supp. 874, 877 (D. Hawaii 1981), *aff'd*, 698 F.2d 1230 (9th Cir. 1983), *quoting Archer v. Air Line Pilots Association*, 609 F.2d 934 (9th Cir. 1979), *cert. denied*, 446 U.S. 953 (1980)." (Pet. App. 109a).

Cross-petitioners sought to avoid the time bar on the ground that the so-called "discovery rule" applied and "by asserting that the running of the limitations period was postponed until after May 18, 1983 because of 'fraudulent concealment' by the unions." (Pet. App. 110a, 111a).

As to the discovery rule, the district court stated:

> . . . None of the plaintiffs states in his affidavit that he made any effort at any time prior to May 18, 1983 to investigate whether or not the implementing agreements had been ratified, who was involved in the negotiation of the agreements and whether anyone was excluded, or whether any provisions of the unions' constitutions had not been followed in the negotiation and/or signing of the agreements. Nor do any of the plaintiffs' affidavits state why they could not have investigated these matters prior to May 18, 1983. (Pet. App. 111a).

The district court also rejected the argument that the "fraudulent concealment" tolling doctrine applied to their claims, finding that none of the individuals "demonstrate[d] the exercise of due diligence prior to May 18, 1983." (Pet. App. 112a). In addition, the district court found that "neither plaintiffs' affidavits nor anything else in the record point to any wrongful concealment by the unions, much less any wrongful concealment by the CNW." (*Id.*).

The Eighth Circuit agreed that the claims for breach of the duty of fair representation, except for the UTU-represented ground service employees, were "governed by the six-month statute of limitation set forth by the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983)." (Pet. App. 24a).

ARGUMENT

Every court of appeals which has decided the issue, has decided the *DelCostello* limitations period applies to breach of the duty of fair representation claims under the Railway Labor Act. (See UTU Cross-Pet. in No. 88-1169 p. 14).

As noted by the first district court to consider the issue in *Linder v. Berge*, 567 F. Supp. 913, 916 (D.R.I. 1983), *aff'd*, 739 F.2d 686 (1st Cir. 1984):

> [T]he duty of fair representation is implied in the union's right to represent all members of the craft, and is not grounded on a specific statutory command. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In fact, the duty of fair representation initially arose in the roundhouse of railway labor relations, *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202-04 (1944), and was only thereafter applied to unions regulated under the NLRA. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). Thus, it is of little moment vis-a-vis the case at bar that the Supreme Court's decision in *DelCostello* was announced against an NLRA backdrop.

If a different limitations period were applied to claims under the RLA, "the congressional will would be thwarted, the rationale of the Supreme Court in *DelCostello* would be undercut, and an inexplicable asymmetry between railroad workers and other union members in the fashioning of remedies for alleged breaches of essentially the same fair representational duty of their respective unions would senselessly be engrafted upon the law." *Id.* at 917.

The fact-specific issues cross-petitioners raise regarding the application of summary judgment principles to

the accrual and tolling issues raised by them have been settled by this Court's decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Fed.R.Civ.Pro. 56(e) specifically places on the non-movant the responsibility of countering motions for summary judgment with affidavits or other proper evidence. When CNW, BLE and UTU moved for summary judgment below, and bore their burden of demonstrating the absence of a genuine issue of material fact as to accrual of the claims, the "non-movant party must come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp., supra*, 475 U.S. at 587.

Cross-petitioners were required to designate specific facts supported by discovery or affidavit showing a genuine issue for trial on the accrual and tolling issues. The duty to evaluate the entire record was their duty. These issues are not worthy of this Court's further consideration.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the cross-petition of the United Transportation Union in Docket No. 88-1169, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit on the issues posed therein, incident to a grant of certiorari in Docket

Nos. 88-968 and 88-994. The cross-petitions in Dockets Nos. 88-1176 and 88-1184 should be denied.

Respectfully submitted,

CLINTON J. MILLER, III
Assistant General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107-4250
(216) 228-9400

Counsel for Cross-Respondent
United Transportation Union

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Nos. 88-1176 and 88-1184

In The

Supreme Court of the United States

October Term, 1988

VANE NEWTON and L. LEE BEARDSLY, ET AL.,

Cross-Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,

Cross-Respondents.

CROSS-RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS' MEMORANDUM IN OPPOSITION TO CROSS-PETITIONS

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313

Attorneys for Cross-Respondent Brotherhood of Locomotive Engineers

(C) 302

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CROSS-RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS' MEMORANDUM IN OPPOSITION TO CROSS-PETITIONS

Cross-respondent Brotherhood of Locomotive Engineers ("BLE") respectfully submits that the cross-petitions filed by the employees of the former Chicago, Rock Island & Pacific Railroad Company ("Rock Island") in Nos. 88-1169 and 88-1176, respectively, further support a grant of the petition for a writ of certiorari filed by BLE in No. 88-968. However, BLE urges the Court to grant its petition and that of petitioner Chicago & North Western Transportation Company ("CNW") in No. 88-994, rather than those of cross-petitioners.

The petition filed by BLE presents the very concise question of whether a court of appeals may provide an

arbitration remedy for locomotive engineers seeking to set aside a seniority implementing agreement, when that court has held that the action to set aside that agreement was time-barred under the six-month limitations period set forth in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and those employees' substantive claims did not lie in federal court. CNW filed the petition in No. 88-994, which raises questions as to whether the suit was timely filed in seeking an order to compel interest arbitration, *i.e.*, arbitration as to the substantive provisions of seniority issues already negotiated between the authorized bargaining representatives, and whether the timeliness of the arbitration ordered by the court of appeals is to be determined by the doctrine of laches, as the court below decided, or the six-month *DelCostello* limitations rule.

The cross-petitions of the former Rock Island employees attempt to raise additional issues not worthy of consideration by this Court and also unnecessary to resolution of the principal issue raised by all parties to these proceedings – the effect of the court of appeals' order upon the seniority implementing agreements. BLE submits that its petition in No. 88-968 and that of CNW in No. 88-994 set forth the proper framework for resolution of the issues in dispute, which the cross-petitions do not. This is so, because the cross-petitioners set forth issues which unnecessarily complicate the analysis and resolution of the principal issue – the effect of the direction to compulsory arbitration of the adequacy of the former Rock Island employees' seniority rights upon the rights of rail labor and management to negotiate upon that

subject under the March 4th Agreement and laws governing railroad labor relations.

In effect, cross-petitioners raise two peripheral questions to the principal issue. They suggest that a two-year limitations period, adopted from Section 3, First(r) of the Railway Labor Act, 45 U.S.C. §153, First(r), should be applied to all claims arising in the railroad industry, including hybrid claims, even though the duty of fair representation was fathered under the Railway Labor Act, the six-month *DelCostello* period has been uniformly applied to railroad breach of collective bargaining agreement and breach of duty of fair representation cases, and the claims of most cross-petitioners would be barred by either period. Cross-petitioners also assert that the courts below failed to properly canvass the record as to the facts supporting their view of the appropriate accrual date for their cause of action and their definition of equitable tolling doctrines, although there is no question that they rely solely on the unsupported allegations contained in the complaint, the record is devoid of any evidence submitted by them to establish any conflict as to the material issues of facts on the limitations issue, and they had multiple opportunities to engage in discovery and to submit affidavits in support of their legal contentions on this issue.

STATEMENT OF THE CASE

BLE is dissatisfied with the cross-petitioners' "statement." Detailed statements of the facts are set forth in the

respective petitions in Nos. 88-968 and 88-994. In particular, cross-petitioners' statement omits reference to the material findings and conclusions made by the trial court relative to the date of accrual of their claims and the inapplicability of the discovery and fraudulent concealment doctrines, which theories were raised before the lower courts and are again advanced before this Court.

In its April 16, 1986 decision, the district court held that the engine service employees' claims in *Newton* accrued on February 16, 1982, the date the implementing agreements were signed, "because (a) the injury about which plaintiffs complain became 'fixed and reasonably certain' at the time the implementing agreements were signed, and (b) the unions took no action of any consequence after that time. *See Hafer v. Air Line Pilots Association*, 525 F. Supp. 874, 877 (D. Hawaii 1981), *aff'd*, 698 F.2d 1230 (9th Cir. 1983), *quoting Archer v. Air Line Pilots Association*, 609 F.2d 934 (9th Cir. 1979), *cert. denied*, 446 U.S. 953 (1980)." (Pet. App. 109a).[1]

Cross-petitioners sought to avoid the time bar on the ground that the so-called "discovery rule" applied and "by asserting that the running of the limitations period was postponed until after May 18, 1983 because of 'fraudulent concealment' by the unions." (Pet. App. 110a, 111a).

Insofar as the running of the limitations period under the discovery rule, the district court cogently pointed out that "knowledge of injury and its immediate cause . . . starts the running of a limitations period under

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[1] "Pet. App." refers to Petitioner BLE's Appendix in No. 88-968.

the discovery rule, not the knowledge of whether that injury is legally actionable." (Pet. App. 110a). Because the *Newton* engine service employees knew of "the existence of the February 16, 1982 agreements and their effect on plaintiffs' seniority during the 15 months between the signing of those agreements and May 18, 1983," the district court found their challenge to the implementing agreements was time-barred.

The trial court then analyzed the facts before it under cross-petitioners' version of the discovery rule, which they admitted required them "to show also that they exercised due diligence within the six months after they learned about the seniority arrangements established by the February 16, 1982 agreements." (Pet. App. 111a). The district court said:

> Plaintiffs have failed to make such a showing. None of the plaintiffs states in his affidavit that he made any effort at any time prior to May 18, 1983 to investigate whether or not the implementing agreements had been ratified, who was involved in the negotiation of the agreements and whether anyone was excluded, or whether any provisions of the unions' constitutions had not been followed in the negotiation and/or signing of the agreements. Nor do any of the plaintiffs' affidavits state why they could not have investigated these matters prior to May 18, 1983. (*Id.*).

The district court also rejected cross-petitioners' argument that the "fraudulent concealment" tolling doctrine applied to their claims, for none of the individuals "demonstrate[d] the exercise of due diligence prior to May 18, 1983." (Pet. App. 112a). In addition, the district

court found that "neither plaintiffs' affidavits nor anything else in the record point to any wrongful concealment by the unions, much less any wrongful concealment by the CNW." (*Id.*). In this respect, the trial court pointed out that while there was not even any allegation of passive conduct, "silence or passive conduct is not sufficient." (*Id.*).

Finally, the district court rejected the cross-petitioners' attempt to establish a new rule that the fiduciary relationship between a union and its members is such that its mere silence is sufficient to excuse the member from exercising due diligence.

Subsequently, CNW and the unions filed dispositive motions in all cases. All parties had engaged in extensive discovery, and the former Rock Island employees had the opportunity between the entry of the April 16, 1985 decision of the trial court and oral argument on these motions on December 6, 1985 to take evidence or present affidavits to dispute or controvert the undisputed facts submitted by CNW and the unions. (Pet. App. 117a). Only two of the plaintiffs, however, presented any evidentiary material. Rather, "plaintiffs' counsel acknowledged that as to the statute of limitations defense most of the plaintiffs in these cases are essentially in the same position as the plaintiffs in *Newton*." (*Id.*). The district court declined to overrule its prior legal conclusions. (Pet. App. 116a). Accordingly, the trial court "considered the individual situation of each plaintiff against whom the statute of limitation defense is directed and finds that all claims arose more than six moths before the filing of the complaints." (Pet. App. 117a).

Thus, the trial court on at least two separate occasions carefully considered the accrual and tolling issues and found that the former Rock Island employees knew or had reason to know of their injury long before the six-month period prior to the commencement of the lawsuit and further that they had not presented any evidence controverting the proofs submitted by CNW and the unions on the limitations issue.

The court of appeals agreed with the district court that the unfair representation claims, except for the UTU-represented ground service employees, were "governed by the six-month statute of limitation set forth by the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983.)" (Pet. App. 24a).

ARGUMENT

It is clear that all parties agree that the issues presented by the lower court decision should be reviewed by this Court. The rail carrier, the labor unions, and the former Rock Island employees all seem to believe that the lower court decision was wrongly decided. As we previously noted, the two basic points raised by cross-petitioners are not worthy of consideration by this Court and do not contribute to resolution of the principal issue involved.

1. Cross-petitioners have not presented any sufficient reason for this Court to grant their cross-petition upon their claim that the two year period for vacation of an adjustment board award under the limited review prescribed in Section 3, First (p) and (q) of the Railway

Labor Act, 45 U.S.C. §153, First (p), (q), should apply to breach of fair representation claims in the negotiation of agreements with railroads, rather than the six-month limitations period prescribed for unfair labor practices in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). Each of the courts of appeals called upon to decide whether the *DelCostello* limitations period applies to unfair representation claims under the Railway Labor Act, and almost all of them have, has held that it does. (See BLE Pet. in No. 88-968 pp. 17-18).[2] Moreover, the same standards govern the duty of fair representation for a railroad union as a union covered by the National Labor Relations Act. As noted by the court in *Linder v. Berge*, 567 F. Supp. 913, 916 (D.R.I. 1983), in finding that there is no distinction with respect to these disputes under either Act:

> [T]he duty of fair representation is implied in the union's right to represent all members of the craft, and is not grounded on a specific statutory command. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In fact, the duty of fair representation initially arose in the roundhouse of railway labor relations, *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202-04 (1944), and was only thereafter applied to unions regulated under the NLRA. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). Thus, it is of little moment vis-a-vis the case at bar that the Supreme Court's decision in *DelCostello* was announced against an NLRA backdrop.

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[2] To the circuits cited therein, we should add *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984), and *Smallakoff v. Air Line Pilots Ass'n*, 825 F.2d 1544 (11th Cir. 1987), which said that the public, if dissatisfied with the consistent reasoning of the courts of appeals, "should look to Congress for correction." *Id.*, 1547.

Based upon this situation, it was concluded that if different periods were applied to claims under each Act, "the congressional will would be thwarted, the rationale of the Supreme Court in *DelCostello* would be undercut, and an inexplicable asymmetry between railroad workers and other union members in the fashioning of remedies for alleged breaches of essentially the same fair representational duty of their respective unions would senselessly be engrafted upon the law." *Id.*, 917.

Finally, it is significant that this Court emphasized in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. *supra,* at 171, that the dual policies fostered by the application of the six-month period are promotion of stable collective bargaining relationships through uniform application of the agreement and rapid, final resolution of labor disputes. Those policies are most prominent in the factual situation before the Court in which the alleged breaches by CNW and BLE are alleged to have occurred through the failure to hire persons three years prior to the filing of the complaint or by the negotiation of the February 16, 1982 implementing agreement, almost twenty months prior to coming into court. These are simply not the type of claims that can be considered disputes that call for other rules of timeliness. These disputes call into play a different interest than that of an employee who is proceeding under the narrowest review provided under the law to attempt to set aside a decision of an arbitrator. The use of the period in which actions may be brought to enforce or set aside arbitration awards would be inconsistent with the underlying policies that the federal labor relations laws were intended to further

with respect to stable bargaining relationships and contracts.

2. The questions cross-petitioners raise regarding the application of summary judgment principles to the tolling issues raised by them are neither important nor novel, and only involve the question whether the court of appeals or district court correctly assessed the record made on summary judgment. As cross-petitioners admit at page 9 of their petitions, they "alleged," "indicate[d]," and "argued," but nowhere either before the district court or the court of appeals, or even before this Court, did they establish or prove that (a) they did not know about their alleged injury; or (b) they exercised due diligence to discover their injury after the negotiation of the agreements they desire to set aside; or (c) the unions engaged in purposeful misconduct or fraudulent activities in order to conceal the injury from them. And the district court held that cross-petitioners failed to demonstrate that they acted with "due diligence" and failed to show that there was fraudulent concealment of the claim. (Pet. App. 112a).

Cross-petitioners attempt to circumvent the holding below on the basis that the movants had the burden to establish that there is no genuine issue of material fact. In other words, cross-petitioners are contending that the parties filing a motion for summary judgment are saddled with the task of showing that no evidence exists to support cross-petitioners' defense. Whatever merit that contention once had it is no longer valid in light of this Court's decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Rule 56(e), Fed. R. Cir. P., specifically places on the nonmovant the responsibility of countering motions for summary judgment supported by affidavits or other proper evidence. Thus, when a party moving for summary judgment has carried its burden of demonstrating the absence of a genuine issue of material fact, the "nonmovant party must come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. *supra*, at 587. Cross-petitioners did not and cannot satisfy this burden, as they have attempted throughout, by simply showing that there is some "metaphysical doubt as to the material facts," here, the fact that the transfer of the physical assets from Rock Island to CNW was approved by the bankruptcy court on June 20, 1983, and therefore may have created some doubt in cross-petitioners' minds as to their final rights. *Id.*, 586. In further explaining the standards applicable to the consideration of summary judgment, the Court has held that in order to defeat a properly supported motion for summary judgment, the nonmovant must produce "concrete evidence from which a reasonable juror could return a verdict in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

Accordingly, there can be no doubt that the trail court applied a correct standard in granting summary judgment on the record before it. The determination that cross-petitioners had failed to demonstrate a factual predicate for their discovery and fraudulent concealment contentions raises no question as to the grant of summary

judgment on the limitations issue which warrants review by this Court.

3. Finally, cross-petitioners raise a number of miscellaneous points to support their conclusion that the *DelCostello* six-month period should not apply to suits to compel arbitration, unless the grievance-arbitration provisions of the labor contracts so provide or the complainants had sought arbitration within six-months following application of the substantive provisions of the contract and had been refused. This argument appears to turn all logic upon its head. First, the argument is contrary to this Court's holding in *Lodge 1424, International Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960), that an injured party has six-months from the execution of the agreement to seek to enforce or prevent enforcement of its terms. Here, one group of cross-petitioners seeks to enforce the provisions of the March 4, 1980 Agreement, as they read its terms, to CNW's refusal to hire them or by hiring them under improper conditions in 1980 and early 1981. Another group of cross-petitioners is claiming that the February 16, 1982 seniority implementing agreement breached the terms of the March 4, 1980 Agreement and, therefore, is unenforceable. Both of the aforedescribed types of claims arose more than six months prior to the filing of the complaints below.

Second, if arbitration is the appropriate forum in which to determine the claims of cross-petitioners,[3] the

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[3] Cross-petitioners seem to also assert that their claims may be heard in arbitration, notwithstanding being time-barred, because this Court stated that even frivolous claims are to be decided by an arbitrator in its opinion in *AT&T Technologies v. Communication Workers of America*, 475 U.S. 643, 649-50

various courts of appeals have uniformly held, up to the decision below at least, that *DelCostello* applies to actions to compel arbitration. (See Pet. in No. 88-994, at pp. 9-10). And finally, one of the major premises of the federal labor policy is the speedy resolution of labor disputes, particularly those that would disrupt stable bargaining relationships – the situation presented here. It makes no sense under the involved circumstances to permit an individual or group of individuals to wait years after execution of the agreements, accepting what benefits they may receive under them, and then be permitted to sue to set them aside.

In sum, though cross-petitioners' ancillary arguments may be unique, it appears clear as to why they were summarily disposed of or not addressed at all by the court below.

(Continued from previous page)

(1986). (*See* Briefs in opposition in Nos. 88-968, p. 15). Not only did cross-petitioners not seek out this relief in their complaints, but they try to extend that decision beyond its boundaries. A full reading of the decision affirms two long-established propositions, neither of which cuts in favor of cross-petitioners' arguments: First, the question of whether there is a duty to arbitrate is an issue for judicial determination (*id.*, 649) – obviously, it follows that the duty is extinguished if not timely exercised and if the court lacks jurisdiction to issue an enforceable determination. Second, the courts are not to construe collective bargaining contracts in the first instance and are not to rule on the potential merits of the underlying claims (*id.*, 650); however, the Eighth Circuit did base its decision on its interpretation of the involved agreements, and improperly specified the decision-making functions left to the arbitrator.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the petition of the Brotherhood of Locomotive Engineers in Docket No. 88-968, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit on the issue posed therein. However, the cross-petitions in Nos. 88-1176 and 88-1184 should be denied.

Respectfully submitted,

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313

Attorneys for Cross-Respondent
Brotherhood of Locomotive Engineers